

**PROPERTY ASSESSMENT APPEAL BOARD
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

PAAB Docket No. 2021-010-10026C

Parcel No. 0634462002

The Malek Theatre Foundation,

Appellant,

vs.

Buchanan County Board of Review,

Appellee.

Introduction

This appeal came on for hearing before the Property Assessment Appeal Board (PAAB) on November 23, 2021. Attorney Benjamin Lange represented The Malek Theatre Foundation. (The Foundation). Assistant Buchanan County Attorney Daniel Clouse represented the Board of Review.

The Foundation owns the Malek Theatre located at 116 2nd Avenue, NE, Independence, Iowa. The subject property's January 1, 2021, assessment was set at \$34,380, allocated as \$19,290 in land value and \$15,090 in improvement value. (Ex. A).

The Foundation filed an Application for Exemption under Iowa Code section 427.1(8)(a) with the Buchanan County Assessor on June 17, 2020. The Application was not submitted to PAAB. The Assessor denied the exemption, but the Assessor forwarded the Application to the Board of Review for its consideration. (See Notice to PAAB Regarding Requested Exhibit C). On May 21, 2021, the Board of Review denied the exemption. (Ex. B).

The Foundation then appealed to PAAB reasserting its exemption claim under section 441.37(1)(a)(1)(c) contending it is entitled to a property tax exemption as a charitable institution.

General Principles of Assessment Law

PAAB has jurisdiction of this matter under Iowa Code sections 421.1A and 441.37A (2019). PAAB is an agency and the provisions of the Administrative Procedure Act apply to it. Iowa Code § 17A.2(1). This appeal is a contested case.

§ 441.37A(1)(b). PAAB may consider any grounds under Iowa Code section 441.37(1)(a) properly raised by the appellant following the provisions of section 441.37A(1)(b) and Iowa Admin. Code Rule 701-126.2(2-4). PAAB determines anew all questions arising before the Board of Review related to the liability of the property to assessment or the assessed amount. § 441.37A(1)(a-b). New or additional evidence may be introduced, and PAAB considers the record as a whole and all of the evidence regardless of who introduced it. § 441.37A(3)(a); *see also Hy-Vee, Inc. v. Employment Appeal Bd.*, 710 N.W.2d 1, 3 (Iowa 2005).

Findings of Fact

At the time of the hearing the parties' representatives stated there were no real facts in dispute. Neither party called witnesses. All submitted exhibits, and requested Exhibits B (Board Decision) and information regarding Exhibit C (Petition), were admitted into the record. Both representatives made legal arguments to PAAB.

The subject is a theatre (the Malek Theatre) built in 1947 with 8120 total square feet of gross building area, including a 1972-square-foot unfinished basement, and a metal canopy. It is listed in very poor condition, with below average (Grade 5) quality construction. The improvements receive 75% physical depreciation, as well as 70% functional and 70% economic obsolescence applied to the assessment. The site is 0.224 acres and is improved with 1000 square feet of concrete paving. (Ex. A).

The Malek Theatre has a 75-year history as an iconic building in downtown Independence. It is listed on the National Register of Historic Places. (Ex. 6). The site was previously occupied by the Grand Theatre, an art deco style theatre, which burned to the ground in 1945. Its owner, Bob Malek, built a new theatre in its place, naming it the Malek Theatre. It took a year to complete and cost \$140,000 to build. For its time it was considered a patron's dream, offering many amenities, elaborate décor, and custom artwork. It was billed as "Iowa's Finest Theatre." (Exs. 3, 4, & 6). The Maleks

operated the theatre through 1978. Thereafter, it was duplexed in the 1980s and many original features of the structure were changed. It ultimately closed in 1985 and has remained vacant since.

In February 2020, the Foundation was formed with a mission to restore the original historical design and integrity of the Malek Theatre for ultimate use as an arts and entertainment center in Independence. The subject property was gifted to the Foundation by Anthony Fitz. The record does not contain any formation documents, such as articles of incorporation, corporate resolutions, or meeting minutes. The Foundation filed an Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, which identified the officers and directors of the Foundation, and its mission to “repair and restore historic theater to operate as non-profit arts & entertainment center in Independence, IA with the vision to enhance our community while creating potential growth in commerce for local businesses.” (Ex. 1). Among other things, the application confirmed the Foundation does not pay compensation to any officer or director. The IRS granted the exemption on May 29, 2020. (Ex. 2).

The Malek Theatre maintains a Facebook page which 1994 people follow. (Ex. 3). The Foundation has engaged in fundraising efforts including soliciting donations, and hosting events to encourage contributions. (Exs. 4 & 7). The theme of the solicitations is “Bring Back the Malek.” The record does not contain evidence of the amount of contributions received by the Foundation.

The Foundation has developed a Restoration Plan itemizing the needed repairs of the subject property. (Ex. 5). According to the Foundation Treasurer, between February 2020 and October 2021 the Foundation has accomplished a variety of repairs at a total cost of \$23,700.85. (Ex. 8). Once restored, the Foundation’s “vision is to operate it as a new entertainment venue; a live performance theatre showcasing musical talent, tribute bands, live stage plays, choral groups and more.” (Ex. 7).

The Foundation asserts it is operated exclusively for charitable purposes, does not afford pecuniary gain to its directors or officers, and no part of the net income or net earnings will inure to the benefit of its directors, officers, or other private persons. (Hearing Brief). Thus, it contends it qualifies for exemption from taxation.

The Board of Review asserts the exemption statute in question is a grey area of the law, and its decision was a judgement call based on the information it had been provided, and it erred on the side of taxation.

Conclusions of Law

The Foundation asserts the subject property should be exempt from property taxation under section 427.1(8) as property owned or under construction by a charitable institution.

“Exemption statutes are premised on the theory that the benefits received by the community from the facility outweigh the inequality caused by the exemption of the property from taxation.” *Southside Church of Christ of Des Moines v. Des Moines Bd. of Review*, 243 N.W.2d 650, 654 (Iowa 1976) (quoting *Dow City Senior Cit. Hous. v. Bd. of Review*, 230 N.W.2d 497 (Iowa 1975)). “They are ‘a legislative recognition of the benefits received by society as a whole from properties devoted to appropriate objects of exempt institutions and the consequent lessening of burden on the government.’ ” *Id.* (quoting *South Iowa Methodist Homes, Inc. v. Bd. of Review of Cass Cnty.*, 136 N.W.2d 488, 490 (Iowa 1965)).

Statutes exempting property from taxation must be strictly construed, and any doubt must be resolved in favor of taxation. *Southside Church of Christ*, 243 N.W.2d at 654. The burden is upon the one claiming the exemption to prove that the property falls within one of the exemption statutes. *Id.* at 651. “Taxation is the rule and exemption the exception.” *Congregation B’Nai Jeshurun v. Bd of Review of the City of Des Moines*, 301 N.W.2d 755, 756 (Iowa 1981) (quoting *Trustees of Griswold College v. State*, 46 Iowa 275, 278 (Iowa 1877)). Exemptions from taxation must be decided on a case-by-case basis. *South Iowa Methodist Homes, Inc. v. Bd. of Review*, 173 N.W.2d 526, 532 (Iowa 1970).

The Foundation contends it qualifies under Iowa Code section 427.1(8)(a), which provides in part:

Property of religious, literary, and charitable societies. All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in

extent and not leased or otherwise used or under construction with a view to pecuniary profit. [...]

The Iowa Supreme Court has repeatedly held that in order to qualify for exemption as charitable use under section 427.1(8), an entity must prove each of the following factors by a preponderance of the evidence: (1) the subject property was used by a charitable institution at the time of the claimed exemption; (2) the subject property was not used with a view to pecuniary profit; and (3) the actual use of the subject property was solely for the appropriate objects of the charitable institution. *Carroll Area Childcare Ctr., Inc. v Carroll Cnty. Bd. of Review*, 613 N.W.2d 252,254-55 (Iowa 2000). If the Foundation fails to meet this burden of proof on a single factor, its claim for property tax exemption must fail. *Sioux Ctr. Cmty. Hosp. & Health Ctr. v. Bd. of Review of Sioux City.*, 2016 WL 1230012 *2 (Iowa Ct. App. 2006).

In this case, these determinations are made more difficult by the fact that the property is currently being renovated and has not yet been used for its intended purpose. We note that in *Des Moines Coalition for the Homeless v. Des Moines City Bd. of Review*, 493 N.W.2d 860, 862 (Iowa 1992), the Iowa Supreme Court elaborated on the meaning of ‘under construction’ in the charitable use exemption statute and stated it also “include[s] renovation and repairs to charitable property.” Property that will be exempt “when renovations are completed and it is occupied, is also exempt during the renovation period.” *Id.* Thus, while the theatre’s current renovation status does not, by itself, defeat an exemption claim; the Foundation must still be able to show it is a charitable institution and that upon completion the theatre will be used solely for the appropriate objections of the charitable institution and without a view toward pecuniary profit.

A. Is the Foundation a charitable institution for purposes of section 427.1(8)?

For the Foundation to show it uses the subject property for charitable purposes, it must demonstrate either: “(1) that [it] affords a charitable benefit to its occupants, or (2) that it is a charitable activity.” *Partnership for Affordable Housing v. Bd. of Review of City of Davenport*, 550 N.W.2d 161, 164 (Iowa 1996). The Iowa Courts “give the term ‘charitable’ in the tax exemption statute a broad definition.” *Care Initiatives v. Bd. of*

Review of Union Cnty., 500 N.W.2d 14, 17 (Iowa 1993). “The mere fact that an institution is a nonprofit corporation does not make it a charitable institution.” *Bethesda Found. v. Bd. of Review of Madison Cnty.*, 453 N.W.2d 224, 227 (Iowa Ct. App. 1990).

In determining whether an institution is charitable, the courts look at a number of factors, including whether the institution received a federal tax exemption based on charitable status, and whether the institution’s articles of incorporation reveal charitable purposes. *Id.* When determining the charitable status of an institution, its stated purpose is less important than the actual use of the property. *Id.* The courts have also placed some importance upon whether contributions of money, goods, and services played some part in the establishment and operation of a charitable institution. *Richards v. Iowa Dep’t of Revenue*, 414, N.W.2d 344, 353 (Iowa Ct. App. 1987).

The Foundation was gifted the subject property. Although its formation documentation is not in the record, its mission identified on its section 501(c)(3) application is to repair and restore the historic theater to operate as a non-profit arts and entertainment center in Independence. The subject is listed in very poor condition, has been vacant for a long period, and the Foundation has a laundry list of needed repairs and restoration items. Repairs to the property have begun and the Foundation has engaged in traditional fundraising efforts to raise funds to “bring back the Malek.” Applying the provisions of Iowa case law, we find the Foundation has established it was a charitable institution as of January 1, 2021.

B. Is the property used without a view toward pecuniary profit?

We now turn to whether the property is used solely for charitable objects and without a view toward pecuniary or private profit. The term “pecuniary profit” refers to “monetary gain which inures to the benefit of private individuals and is not simply an excess of income over expenses.” *Bethesda Found.*, 453 N.W.2d at 228. To that end, the Foundation has received 501(c)(3) status and has engaged in fundraising, and dissemination of information about the organization on social media. Its officers and directors are not compensated. At the present time, the property itself is not generating any revenue. Based on these facts, we find the subject property is not being presently operated with a view toward pecuniary profit.

C. Is the property used solely for the appropriate objects of the charitable institution?

It is the actual use of the property that determines whether a property is being solely used for the appropriate objects of the charitable institution. *Carroll Area Childcare Ctr.*, 613 N.W.2d at 255. In *Parson's Inn, Inc. v. Mahaska Cnty. Bd. of Review*, 2006 WL 1408432 *5 (Iowa Ct. App. 2006), the Court of Appeals concluded a non-profit inn used for temporary housing and support services did not qualify for property tax exemption due, in part, to the fact the property was not being actually and solely used for a charitable purpose. The Court noted there was no showing that guest stays were related to the non-profit's charitable purpose and "for a great majority of the year the substantial majority of the premises is being used exclusively as the [operator's] family residence." *Id.*

With a use perhaps more alike the intended use of the subject property, the Iowa Supreme Court denied a full property tax exemption for a fraternal lodge in *Aerie 1287, Fraternal Order of Eagles v. Holland*, 226 N.W.2d 22 (Iowa 1975). The facts showed the first floor of the building consisted of a profitable bar, almost exclusively used by members, and second floor hall occasionally used or rented for meetings and social functions. *Id.* at 25. Based on these facts, the Court stated "[i]t is apparent [] a substantial portion of this building is not used solely for appropriate objects." *Id.*

The foregoing cases demonstrate that a property's use must be consistent with the charitable organization's mission and purpose to qualify for exemption. Still, the Foundation acknowledges a dearth of Iowa case law with facts similar to this case. (Foundation Brf. pp. 4-5). However, it points to case law from other jurisdictions where similar institutions have been found to be charitable and exempt from property tax. See, *Lena Community Trust Fund, Inc. v. Department of Revenue*, 750 N.E.2d 1261 (Ill. Ct. App. 2001). In *Lena Community Trust Fund*, the Illinois Court, interpreting an exemption statute similar to Iowa Code section 427.1(8), found a community center that offered its building space to businesses, community organizations, and private individuals for meetings and functions was operated for charitable purposes and not run with a view toward pecuniary profit. The Court noted the availability of space where members of the community can meet provides a valuable service and promotes society's well-being.

The New Hampshire Supreme Court considered a charitable exemption for a function hall rented out to other charitable organizations for fundraising events. *Appeal of Kiwanis Club of Hudson, Inc.*, 663 A.2d 90 (N.H. 1995). Notably, the Court recognized the rents “are limited to the direct expenses of operating the hall and user feeds, which are set by the New Hampshire Sweepstakes Commission.” *Id.* at 92. The Court found the property facilitated other charitable organizations’ ability to raise funds, which was within the Kiwanis’ charitable purpose and held the property should be exempt. *Id.* In another case involving an event hall and auditorium rented out to civic, educational, charitable, and private entities for events without a view to profit, the Ohio Supreme Court similarly concluded the property should be exempt under Ohio’s charitable use statute. *Galvin v. Masonic Toledo Trust*, 296 N.E.2d 542 (Ohio 1973). Though not cited by the Foundation, other court decisions also support the notion that a facility owned by a charitable institution and rented out or used for cultural, civic, educational, or even private events can qualify for property tax exemption. *Henash v. Fairbanks North Star Borough*, 265 P.3d 302 (Alaska 2011); *Pocono Community Theater v. Monroe Cnty. Bd. of Assessment Appeals*, 142 A.3d 110 (Penn. 2016); *Fulton Cnty. Bd of Tax Assessors v. Piedmont Park Conservancy*, 775 S.E.2d 742 (Ga. 2015).

The Foundation was incorporated as a nonprofit corporation after receipt of a gift of the subject theatre. It has received 501(c)(3) status and has engaged in fundraising, and dissemination of information about the organization on social media. Its officers and directors are not compensated. Its sole purpose at this time is repair and renovation of the Malek Theatre. To date it has been able to complete some repairs, and the list of many other needed items is long. The record does not contain a timeline for these efforts before the theatre will be accessible to the community. The evidence reflects a number of remaining renovations, that may be accomplished as donations of money or services become available. Once complete, the Foundation plans to operate the property as a performance theatre for musicians, bands, plays, choral groups, etc.

If used in the manner the Foundation presently indicates, we find the property would qualify for a property tax exemption upon completion. The use of the property as

a non-profit arts and entertainment venue falls squarely within the Foundation's mission. Further, the caselaw supports the notion that such a use affords a public benefit.

Having considered all the evidence, we conclude the subject property is solely used or under construction by a charitable institution with no view to pecuniary profit. We find the subject property qualifies for property tax exemption under section 427.1(8). Of course, should the Foundation's future plans for the property not come to pass, it stands to reason its exemption may be reconsidered.

Order

PAAB HEREBY MODIFIES the Board of Review's determination and orders the subject property is tax exempt under Iowa Code section 427.1(8) as of the January 1, 2021 assessment date.

This Order shall be considered final agency action for the purposes of Iowa Code Chapter 17A (2020).

Any application for reconsideration or rehearing shall be filed with PAAB within 20 days of the date of this Order and comply with the requirements of PAAB administrative rules. Such application will stay the period for filing a judicial review action.

Any judicial action challenging this Order shall be filed in the district court where the property is located within 30 days of the date of this Order and comply with the requirements of Iowa Code section 441.37B and Chapter 17A.



Elizabeth Goodman, Board Member



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Karen Oberman, Board Member

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